United States Court of Appeals

for the Second Circuit

APPENDIX

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United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED STARK AND JAMAICA 201 ST. CORP., INC.
AND JAMAICA 202 ST. CORP., INC.,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD.

BRIEF AND APPENDIX FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Statement of the Issues Presented:

In addition to the issue set forth in the NLRB's ("Board") brief as to whether substantial evidence on the record as a whole supports the Board's findings, there is also presented the following additional issue.

Whether the Administrative Law Judge's out of hand refusal to sequester witnesses, including the alleged discriminatees, because this is the Board's "uniform policy", and the Board's affirmance thereof by adhering to such "long established rule" denied Respondents the opportunity for a full and fair disclosure of the facts.

The Facts

1) No Prior Anti-Union Animus

About one month prior to the instances alleged in the complaint, Respondents voluntarily recognized the Charging Party, Local 32-B, as the collective bargaining agent without putting the Union to the necessity of an election, for four buildings known as "Arlington Village Inc." and promptly entered into a collective bargaining agreement with said Union (A44-45, 13).

2) Filing of Unfair Labor Practice Charges

Although the alleged unfair labor practices occurred in May 1973, the charges of unfair labor practices were not filed until more than 5 months later, on October 18, 1973 (A1, 32).

3) The Union's Unlawful Demand for Recognition as Bargaining Agent

On May 10, 1973 Respondents received the Charging Union's letter making a claim to represent a majority of their employees and requested a meeting to negotiate a contract[1] (A42). On some unidentified date thereafter Respondents called the Union Representative and asked what it was all about and was informed that the Union represented the employees and wanted to negotiate a contract; Respondents said there must be some mistake and asked who the people were and the Union Representative gave Respondents 2 or 3 names to which Respondents replied that they had already been fired (A43). Since the names of the 2 or 3 unidentified persons were given to the Respondents after they were already fired, this could not indicate that the Respondents had knowledge prior to the

[1] This claim was untrue and the Regional Director found that, in fact, the Union "did not represent a majority of the employees" (A45).

terminations that these employees had joined the Union There is no evidence that the Respondents knew who were Union adherents at the time of their terminations. The Administrative Law Judge bases the knowledge that they were union employees on a supposition which finds no support in the record.

4) Respondents' Lack of Knowledge That The Alleged Discriminatees Had Engaged In Any Union Activities When They Were Terminated.

The Board had the burden of proving that Respondents were aware of the alleged discriminatees union activities in order to terminate them on the basis of those activities. The only union activity was the signing of union cards on April 30, 1973 in a private apartment (A202).

The Board argues that the coincidence in time between the Union's demand for recognition and the terminations is substantial evidence of the Company's anti-union animus and that the terminations were motivated by such animus (Board's Brief p. 7). This argument is untenable. "Of course any discharge during a union campaign could be said to be ill-timed because suspicions on both sides are then at their peak." *Torrington Co.* v. *NLRB*, 506 F.2d 1042, 1048 (4 Cir. 1974). Of even greater importance is the lack of any evidence as to the Company's knowledge of the alleged discriminatees union activities before they were terminated. Such knowledge is required to sustain the holding of the Board. *NLRB* v. *Lexington Chair Co.*, 361 F.2d 283, 291 (4 Cir. 1966).

It was not until May 10, 1973 when the Union's letter for recognition was received by Respondents that it had any knowledge that there was any union activity (A5). It still had no knowledge who the employees were that had signed union cards. According to Board witness Larmond Stark phoned the Union on some "unidentified date" after receiving the letter (A5) and the Union delegate mentioned 2 or 3 names (also unidentified) of employees who had signed

with the Union (A43). This conversation as testified to by Board witness Larmond took place after the unidentified 2 or 3 persons had already been fired, because Larmond said Stark told him the 2 or 3 persons had already been fired (A43). There is, therefore, no evidence that the Respondents knew before termination that the alleged discriminatees had joined the Union. Such knowledge is required to support the holding of the Board.

Under certain circumstances an inference may be drawn that an employer knew of the union activities of specific employees from evidence that union activities were carried on in such a manner, or at times that in the normal course of events the employer must have noticed them. *NLRB* v. *L. I. Airport Limousine Service Corp.*, 468 F.2d 292, 295 (2 Cir. 1972). No such union activities occurred here.

In our case the solitary union activity was the signing of union cards in the secrecy of a private apartment.

The circumstantial evidence in this record does not permit or require a finding that substantial evidence exists to support the position that Respondents knew that the alleged discriminatees had engaged in union activities when they were terminated. Not knowing of their union activities when they were terminated, therefore the terminations could not have been motivated by their union activities. The Respondents must be aware of the employees union activities in order to discharge those employees on the basis of those activities.

5) The Drinking Problem

Drinking had been a problem among Respondents' employees for a long time and it was getting out of hand and the work was not getting done (A53, 75, 89). Therefore, about a week or two before May 11, Respondents again addressed the workers and told them to stop this drinking because it is becoming dangerous and that employees can get hurt because they can't function right. Employees were

warned that there must be no more drinking on the job; if it continues the men would be discharged (A270).

Prior to this warning Huff had to be carried off the roof because he was drunk and on that occasion he was fired (A237). About 2 or 3 months prior to May 11 Evans had been fired for drinking (A281).

6) The May 11 Terminations

On May 11, 1973 Thompson, Evans, Huff and Maksymchak were terminated. The record indicates that they were terminated not for any union activity. In fact, they did not engage in any union activity and all the record indicates is that they signed union designation cards. There is no evidence that Respondents knew that they had signed such cards.

(A) *Charles Thompson*

On May 11 Harold Stark visited Thompson's job site and had to look for him elsewhere because he walked off his assigned job (A50, 232-233). As Thompson said, Harold Stark "caught me up there" (A70). Harold Stark took Thompson back to his assigned job and admonished him "Don't ever do that again"; do your work (A264). Thompson admits that he has told that he and Evans and Huff were to get the coal and the wooden stuff cleaned out of the basement (A66-67, 70). Thompson said "Okay" (A264). The Judge completely disregarded this incident and made no reference to it. If, in fact, Respondents were looking for a pretext they could have fired Thompson for leaving his job without permission. Instead, he was permitted to return to his job and was told to do his work.

After lunch instead of continuing to work the 3 men stopped and went to the office (A70).[2] Thompson was

[2] Board witness Huff said that after lunch they worked for a while and then returned to the office (A137) and that in a half hour before lunch they had cleaned out a "nice size pile of it" (A136-7).

asked: "Why didn't you finish up the job." He said "We are not doing it, we are not working there." Stark asked, "What are you talking about?" and he couldn't get a straight answer out of him (A266).

Thompson admitted, when questioned by the Judge that on May 11 "I had been drinking. He [Harold Stark] did not say I was drunk. He said you have been drinking. He said you are fired" (A52).

Thompson admitted that he had been reprimanded for drinking. As he said, "*Many times* I would be drinking on the job", despite being told "Don't drink on the job" (A53). Despite this the Judge says there is no evidence that any complaint had been made about Thompson drinking on the job or that on May 11 he had been drinking (A16, 20). Thompson admitted that the problem of drinking required Harold Stark to tell the men "a million times" that they must "stop this drinking on the job" (A53) and that men had been sent home for drinking (A75). Dischargee Maksymchak further corroborated that employees had been drunk on the job and were criticized for it (A89). The drinking problem was getting out of hand and about one week before May 11 Respondents warned employees to stop drinking on the job because it was dangerous and that they could get hurt because they can't function right (A270). If it continued they would be fired (A270). None of the Board's witnesses denied this.

Respondents never asked Thompson about nor did he talk to them about the Union (A54).

Thompson when he returned to the office and before Harold Stark arrived told Karen Gsell, one of Respondent's office workers, "I have had it. I quit" (A230). She had said nothing to him to cause him to make such a response. The Judge faced with this testimony conjectures that Karen "misunderstood Thompson" (A7).

Gsell's testimony that Thompson had said he quit was uncontradicted. The Administrative Law Judge did not disbelieve her. Characterizing such uncontradicted testimony by his conclusion that Gsell "misunderstood" Thompson (A7 fn. 3) is not a substitute for a rational analysis. There was no evidence to support any such inference of misunderstanding. "[E]ven the most liberal construction of the substantial evidence rule should not allow a critical fact to be so proved." *Torrington Co.* v. *NLRB,* 506 F.2d 1042, 1049 (4 Cir. 1974). Also his characterization that the testimony of the 4 employees as to the incident of May 11 is to be compared with the uncorroborated testimony of Harold Stark[3] and that the likelihood of perjury or mistake becomes more remote in direct, or even geometric proportion to the number of persons who testify to a fact (A16) is not a substitute for a rational analysis of the evidence. There is nothing in the record to substantiate the Judge's statement of any misunderstanding. Her testimony was clear and convincing and the Judge did not discredit it (A7 fn. 3). It is most difficult to understand how the Judge could have arrived at such a conclusion since the words uttered by Thompson were very simple and directly to the point. "I have had it. I quit" cannot be the subject of a misunderstanding and it was not. Additional evidence that Thompson did not want to work any more and that he was quitting is found in Helga Schenk's testimony when Thompson told her "I ain't doing any more work" (A257). Here again, the Judge did not discredit Helga Schenck's testimony but completely condones Thompson's refusal to do any more work.

The Judge in excusing Thompson's statement states that no reason was suggested why Thompson should have

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[3] There could be no corroboration of Harold Stark's testimony because the fact is that he was the only one on behalf of the Respondents who was present in connection with his conversations concerning the 4 employees on May 11.

quit (A7 fn. 3). Respondents had no burden of offering any such reason. This incident when viewed against the incidents earlier that same day when Thompson left his job and went philandering around to the job site of another worker, clearly indicates that Thompson had made up his mind that he wasn't going to work. It is not incumbent upon the Respondents to show why he would say he quit. It is sufficient that he quit.

Thompson sought to give the impression that the reason they stopped working on May 11 was that the work was too hard for them. Yet he admitted that on May 11 before going to the job on which he, Evans and Huff quit working at, on a prior job earlier that day, the 3 of them had unloaded almost 300 pounds of iron (A62-63). Despite Thompson's claim that they quit work because the coal was too heavy, he admitted that they had 5 and 10 gallon containers to remove the stuff and that "*one man* can lift it" (A67), and that in a half hour before lunch they had loaded a half a ton of coal and there was about 2 tons left (A55, 80). Board witness Huff confirmed this (A136-137). Thus, if they had continued their work after lunch, they would have completed that job in about another 2 hours. Board witness Huff admitted that on previous jobs they had lifted 40 to 50 pound containers (A139).

Thompson was not a candid witness and very often he would fence around about giving an answer, as for example, he had been asked if Harold Stark had asked him what he was doing on Moultrie's job earlier on May 11. He answered "I could say yes and could say no" (A66). But when he was shown his Board affidavit, he finally was forced to admit that Harold Stark did ask what he was doing on that job (A66).

There is no evidence that Thompson was an active union supporter. All he did was sign a union card. And there is no evidence that Respondents knew this.

(B) *Roger Evans*

Roger Evans, a laborer, is Thompson's brother-in-law, and on May 11 he worked with Thompson (A111). He had been fired once before for drinking (A129-130) and told not to do it any more (A113, 124).

With respect to his drinking problem, while he sought to deny it, upon questioning by the Judge, he finally admitted that he had been found drinking at least once before on the job (A130-131). He also admitted that on "a lot of mornings" Respondents had warned the men that there was to be no drinking on the job (A122). He knew it was wrong to drink on the job (A124).

He admitted that at no time was he asked about the Union or whether he joined it and he never discussed the Union or anything about the Union with Respondents (A115).

Despite Thompson's statement that the work on May 11 was hard and they needed more men, Evans testified that they had done this kind of work before (A119). When Evans was pressed for an answer as to why on May 11 after lunch he didn't go back to work, he said it was because he took orders from Thompson, and he did what Thompson told him to do (A125-126). Instead of returning to work after lunch he, Thompson and Huff, waited outside Respondents' office until Harold Stark showed up after 2 P.M. At that time he was asked "What is wrong with you?" He picked his head up and started to mumble and Stark said "You have been drinking". Evans did not reply, his eyes were plastered, he looked up at Stark, mumbled and just passed out (A266).

(C) *Wayne Huff*

Wayne Huff was employed as a general laborer (A132). He is about 5 feet 11 inches tall and weighs about 200-215 pounds (A138). Despite Thompson's statement that the

work was hard, he admitted that "many times" they all lifted 45 to 50 pound containers (A139). The stuff that had to be cleaned out of the basement "was mostly ashes and garbage" (A136). He admitted that in the half-hour before lunch they loaded "quite a few buckets full" or a "nice size pile of it" (A136-137).

Board witness Maksymchak admitted that he heard Respondent warn Huff not to drink on the job (A89).

Huff admitted that Respondents never said anything about the Union—good or bad—and never discussed the Union (A135-136).

Since they all lifted as much as 50-pound containers before, this work of cleaning out the basement was nothing unusual and was within the normal course of their work assignments.

While Evans testified that at 12 o'clock they quit for lunch and that immediately after lunch they went back to the office (A112), Huff on cross-examination contradicted Evans and said that after lunch "We started to work for a few minutes" (A137), and that it was after they had recommenced work that Thompson decided that they should stop working.

Stark asked Huff on May 11 "What is wrong with you?" and he nodded his head and said "We are done with the work". Stark then told him, "You have been drinking". "You didn't do the work", "You are fired", pointing to Thompson, Roger and Huff (A266).

Huff had previously been fired for being dead drunk. He had to be carried down from the roof of a building (A237). He was drunk and when they brought him down they had to hold him up (A253). As a result of this incident Huff was fired but later reemployed (A242). In another incident, he was drunk and he slipped and fell under the truck (A238).

(D) *Jeff Maksymchak*

Helga Schenk, the office manager, on May 11 had left instructions for Maksymchak that when he came in to work he was to wait for her, since she had an errand for him to do (A255). On May 11 he was scheduled to, and did report, ready for work (A255). Maksymchak admitted that when he came into the office on May 11 he was ready to go to work (A98). He had not told Respondents that he wasn't coming in to work (A109).

Board's witness, Thompson, admitted that Jeff said "he didn't feel like working" (A56), that Jeff was not sick—"he just did not feel like working" and that Respondents asked Jeff "Are you going to work" and that Jeff replied that he did not feel like working (A56-57). Maksymchak was told that if he didn't want to work he was fired (A266-267).

Despite Maksymchak's claim that he didn't feel well, he nevertheless drove Thompson, Huff and Evans around in his car all afternoon on May 11 and didn't complain about pains in his stomach (A145). No sick person would so conduct himself.

Although he said his work was never criticized (A81) on cross examination when he was shown his Board affidavit as part of the investigation, he admitted that his work had been criticized (A91). Despite this admission the Judge says the evidence does not reveal that he had given Respondents any cause for dissatisfaction (A16).

Wayne Huff admitted that Respondent asked Maksymchak if he was going to work and that the conversation about drinking only concerned "three of us" (A134) to wit, Thompson, Evans and Huff.

For reasons best known to Maksymchak he just did not want to work on the afternoon of May 11.

7) Felipe Ortiz

Felipe Ortiz ("Ortiz") was hired as a porter and testified that while he understands English, he does not speak it. But the fact is that he does speak English (A168-169). Thus, in English he testified as to where he resided, where he was employed at the time of the hearing, that he had worked for Respondents as a porter, giving the exact date he started to work, the address of the building he worked at, and that his job was to sweep and mop (A168-169). He admitted that when he was interviewed by the Board's agent as part of the investigation he was asked questions in English and signed the statement written in English and swore to it but that he did not ask the Board agent to have someone interpret it for him (A183). He feigned illiteracy or at least partial illiteracy. He claimed he did not speak or understand English well enough to answer questions in English. When put to the test at the hearing, it clearly appeared that he understood and could speak English quite adequately.

The New York State Unemployment Insurance hearings and decisions (A38-40) show that Ortiz refused to pick up papers and clean dog droppings from bushes and sidewalk in front of the building. Ortiz told Respondents he would quit his job rather than clean the front of the building (A39-40). The Judge seeks to dispel the effect of the Unemployment Insurance decision by saying he is at a loss to comprehend how the Referee could have understood Ortiz in English (A18 fn. 7). The Judge completely overlooked the fact that the Referee at the Unemployment Insurance specifically asked Ortiz if he needed an interpreter and he unequivocally stated "No" (A180-181, 38-40). Ortiz admitted that he had refused to clean outside the building (A179).

Harold Stark had complained to Ortiz that there was garbage all over the place and in the bushes; and that he told Ortiz that there are plenty of shovels, tools and things

to use to clean up the mess (A235-236). Ortiz replied that he was not going to keep the outside of the building clean (A235) and when told that it was his job, he stated "I am not going to do it" (A236). "I quit right now" (A244).

He admitted that Harold Stark did not say he was fired (A184).

While the decision of the Unemployment Insurance Dept. may not be conclusive on the Judge, it is clearly relevant evidence that Ortiz was not fired, but left his job voluntarily rather than do his assigned work. While the decision of the State agency may not be controlling, it has probative value. *Supreme Dyeing & Finishing Corp.*, 147 NLRB 1094, 1095 fn. 1. Accord: *NLRB* v. *Tennessee Packers Inc.*, 339 F.2d 203 (6 Cir. 1964). The Administrative Law Judge out of hand rejected it because he was at a loss to comprehend how the Referee could have understood Ortiz. But the Referee did understand Ortiz. The Administrative Law Judge says that because Respondents did not offer Ortiz his job back on condition that he clean up the bushes, the failure so to do is inconsistent with Respondents' version of the event (A18). No such thing. Respondent was under no duty to offer Ortiz his job back on condition that he do his work. He had already refused so to do. The Board cannot save Ortiz from the consequences of his refusal to do his work by saying that he should be offered his job back on condition he does his work.

From his demeanor on the witness stand, it is obvious that, when given an order to work, he flies off the handle and becomes very angry. The Judge stated for the record that Ortiz when being questioned flew off the handle, got up from his seat, and banged on the table in an angry manner (A181). At this juncture Ortiz said "I go home" (RA 4). He was going to walk out of the hearing.

He admitted that "at no time" did Respondents speak to him about the Union (A184). Furthermore, there is no

evidence that Ortiz was an active union supporter. All he did was sign a union card. And there is no evidence that Respondents knew this.

Ortiz quit his job rather than clean up outside the building. Even if his termination be viewed as a discharge, he was properly discharged because of his refusal to perform his work.

8) George Peters

On May 15 Peters "told" Respondents that he would not be in the next day, because he had to go to the Veterans Administration for treatments (A203). He was allowed the day off for such purpose.

He admitted on cross examination, and the Judge found, that his statements about going to the Veterans Administration were untrue (A208, 11). He admits that when he was discharged on May 17 he was told that he had lied. He was seen the day before driving around in the neighborhood instead of being at the Veterans Administration (A225).

On the morning of May 17 when Peters was picked up for work Harold Stark was present (A204, 209). Peters says that he was fired because he went to the Union the day before (A204). These statements are unworthy of belief because the only ones who had gone to the Union the day before were the 4 men who had been terminated and Peters and it is incredible and unworthy of belief that any one of them would have told the Respondents that they had gone to the Union on May 16. The Respondents had no way of knowing that the men had gone to the Union. Peters admitted that Respondents never asked him and no time did he tell them who had joined the Union (A218). Peters told them he was going to the Veterans Administration and there is nothing in the record to show

how the Respondents could have known to the contrary[4] except the Judge's guess that Respondents had sources of information about employee movements (A22).

The Judge's statement is sheer speculation. The Judge further compounds his error when he states that Peters and the discharged quartet (5 not 4 were actually involved) "were apparently observed by someone who reported the matter to Fred Stark" (A11). This is a wild guess on the Judge's part and there is absolutely nothing in the record whatsoever to support such gratuitous conjecture.

Peters has twice been convicted of armed robbery,[5] (A210) and with respect to the second conviction for first degree robbery on his plea of guilty, he received a jail sentence of 5 to 10 years (A211, 212). He violated his parole and was sent back to prison (A212). In addition, he pleaded guilty to felonious assault (A212).

Harold Stark, who admittedly was present when Peters was fired, said it was not true that his father had told Peters that he had fired the men for joining the Union

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[4] The discharge of Peters came about because admittedly he lied when he asked for the day off by saying he had to go to the V.A. when, in fact, he did not do so. "Any Employer has the right to demand that its employees be honest and truthful in every facet of their employment . . . any employer has the right to discipline an employee for his . . . untruthfulness. . . ." *NLRB* v. *Mueller Brass Co.*, 509 F.2d 704, 713 (5 Cir. 1975). There is not a scintilla of evidence in the record to sustain the Administrative Law Judge's statement that the Respondents were informed that Peters was going to the Union and that is why he wanted the day off (A22). Any such statement by the Administrative Law Judge is based on conjecture and supposition and not on evidence.

[5] That the credibility of a witness may be impeached by showing he has been convicted of crimes is well established. In *N.L.R.B.* v. *Baldwin Locomotive Works*, 128 F.2d 39 (CA 3), the court held that counsel may show convictions for felonies or misdemeanors amounting to *crimen falsi* in accordance with a well recognized rule of evidence. Citing *United States* v. *Montgomery*, 126 F.2d 151 (CA 3). In *American Manufacturing Company*, 70 NLRB 1132, the Board has applied this rule.

(A276). His father never mentioned anything about the Union and had no talk with Peters about the Union (A277). He denied that his father had said to Peters that Peters was his man and that he had stabbed him in the back and that he could only work for him if he stayed away from the Union (A277).

According to Harold Stark on that occasion there was no talk whatsoever about Peters concerning anything about the Union, or about the men being discharged. It just doesn't strike one as being plausible that Fred Stark would have, in effect, bared his breast to Peters.

On May 17, the day that Peters was fired, Harold's father did not pick up Peters (A277). Peters was fired because he lied since he wasn't at the VA Hospital (A278).

Harold further denied that his father had told Peters to stay away from the Union nor that he had gone to the Union the day before (A278-279). The Respondents would have had no way of knowing that on May 16 Peters and the 4 involved in the May 11 incident had gone to the Union unless one of these people had told it to them. It is inconceivable that those involved in the May 11 incident would have said anything about it and certainly Peters would not have said anything because he had used as an excuse for getting the day off that he was going to the V.A.

Peters was a supervisor within the meaning of the Act, and, therefore, not an "employee". He admitted he was employed as a foreman (A201). While he denied that he had the duty and responsibility to supervise the roving maintenance crew (A212) who worked under his supervision (A234), yet in his Board affidavit (A213) as part of the Board's investigation, he swore to the contrary, namely, that "I was also to supervise the roving maintenance men" (A293) and to see that "work is being done" (A213). He decided which men to send to other jobs;

and to see not only that the jobs "were done" but "were done *properly*" (A214). While employees are required to sign in, he was not required to do so (A214). He also was given a free apartment and free utilities; privileges not enjoyed by any other employees (A280-281). He would check up on the men's work (A293). He gave out work assignments (A246). Board counsel brought out that "Peters is in charge, Peters runs the job" (A247, 279-280).

Because 2 or 3 employees weren't doing enough work to suit Peters, he disciplined them by firing them and sending them home (A235, 280). On another occasion, on Peters' recommendation that other employees be fired because they weren't doing good work, his recommendation was given special weight and Respondents terminated the employees involved (A285). Peters did not deny these incidents.

The supervisory status of Peters depends on whether he had been given the authority to or did assign or lay off or discharge or discipline employees. See Section 2(11) of the Act (Board's Brief, p. 13 fn. 9).

For Peters to be a supervisor he need not meet all the criteria in Section 2(11). That section is to be read in the disjunctive and the existence (regardless of its nonexercise) of any one of the indicia listed is sufficient. *NLRB* v. *Edward G. Budd Mfg. Co.,* 169 F.2d 571, 575 (6 Cir. 1948), cert. denied 335 U.S. 908; *NLRB* v. *Corral Sportswear Co.,* 353 F.2d 961, 963 (10 Cir. 1967); *Ohio Power Co.* v. *NLRB,* 176 F.2d 385, 387 (6 Cir. 1969), cert. denied 338 U.S. 899; *Beaver Meadow Creamery, Inc.,* 215 F.2d 247, 251 (3 Cir. 1954), and cases cited therein at fn. 9 and 10.

The criterion which the Board looks to first and most often, however, is the authority of the person in question to hire and fire employees or effectively to recommend such hiring and firing. *W. Horace Williams Co.,* 130 NLRB 223 (1961). The fact that a person may only for a small part

of his working time act as a supervisor does not detract from his supervisory status. *Swift & Co.*, 129 NLRB 1391 (1961) *supplemented*, 131 NLRB 1143 (1961); *Sears Roebuck & Co.*, 127 NLRB 583 (1960).

The record shows that Peters performed one or more of the tasks which qualify him for supervisory status. As a supervisor within the meaning of Section 2(11) of the Act, Peters is not an "employee" within the meaning of the Act and hence does not enjoy the protection of Section 8(a)(3).

His duties were not of a routine or perfunctory nature but admittedly he had the authority to and did discipline employees. The Board's brief (p. 13 fn. 9) indicates that a "supervisor" includes an individual who has the authority to discipline other employees. This record amply supports the fact that Peters did discipline employees in that he sent employees home who had not been properly performing their work and that his disciplining of employees involved of necessity the laying off and discharging of such employees (A235, 280, 285).

Peters was neither an "employee" within the meaning of the Act nor was his discharge prompted by anything but his lying about his reasons for taking the day off.

9) Harold Stark's Brief Conversation with Kenroy Bishop

Kenroy Bishop, on May 17, had a very brief few words with Harold Stark. Board witness Bishop says all that was said was that Harold Stark told him "he had just fired Peters[6] and the Union won't come in here" (A147). That night Bishop approached Harold Stark and asked him if he was a worker would he have joined the Union, and Stark replied "No" because, in his opinion, the Union is no good, it will mess the place up (A147). There was nothing coercive in the talk lasting a few moments—Stark's reply to

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[6] Peters testified that it was *Fred* Stark who fired him and not *Harold* Stark.

Bishop's question was non-coercive. It was short. The Bishop talk was mostly trivial.

Bishop further stated that on May 17, that although Harold Stark told him he had fired Peters, he did not say why nor was it because Peters joined the Union (A151-152, 157, 158).

The Board (Brief, p. 6) says that Stark stated he had fired all the guys who had signed for the Union except Bishop but cites no appendix reference except the Judge's decision (A12). But Appendix 146-147 contains no such testimony as quoted by the Judge. Bishop said he was told "he had fired all the guys" (A147) not as the Judge quotes "he had already fired everybody who had signed for the union, except me" (A12). Bishop did not say "who had signed for the union". While Bishop said he fired all the guys—when asked to repeat what Stark said to him—he said he must give up on union because "it won't come in here" (A147).

The conversation with Harold Stark took place after the terminations had taken place. There is absolutely no evidence of any anti-union animus prior to the terminations.

Accordingly, these statements made to Bishop were not coercive and were within the free speech protection of Sec. 8(c) of the Act, 29 U.S.C.A. § 158(c). *NLRB* v. *Sandy Hill Iron & Brass Works,* 165 F.2d 660 (2 Cir. 1947); *Bourne* v. *NLRB,* 332 F.2d 47 (2 Cir. 1964).

This incident was a fleeting one and seems trivial but it turns out that it is one of the chief foundations on which the Board found that the company violated § 8(a)(1) of the Act. We submit that Respondents' statement to Bishop was not evidence of anti-union feeling, but an indication of Respondents' opinion as to whether or not, in his opinion, the Union was good. Bishop invited such a reply when he approached Harold Stark and asked him whether if he was a worker, would he have joined the Union.

The Administrative Law Judge faced with the admission by all the alleged discriminatees that the Respondents did not discuss the union with them and neither they with the Respondents, states that such testimony is not sufficient because Respondents did not deny specific statements allegedly made by Respondents (A12).

The whole is greater than any of its parts and the alleged discriminatees' testimony that there was no discussion about the union would include anything concerning the union. Furthermore, when Respondents sought to have its witnesses specifically deny statements attributed to Respondents by Peters, the Judge refused to permit such line of testimony and sustained the Board's General Counsel's objections thereto (A274-275). However, after Respondents persisted in asking such questions, there was t stimony specifically denying these statements (A276-277).

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union absent a threat. *Hertzka & Knowles* v. *NLRB,* 503 F.2d 625, (9 Cir. 1974).

Summary of Argument

This case must be viewed against the background of no anti-union animus; in fact, the Respondents, about a month prior to the terminations involved herein, voluntarily recognized the Charging Union as bargaining representative and executed a collective bargaining agreement with the Union. The only union activity engaged in by the alleged discriminatees was their signing of union designation cards in the secrecy of someone's apartment. There is no evidence that prior to the terminations that the Respondents had any knowledge of who had and who had not signed these cards. The record does not establish that the alleged discriminatees were terminated because of anti-union animus. In addition, with respect to Peters, he was

a supervisor and, therefore, not an employee entitled to the protection of the Act. Additionally, the Administrative Law Judge's out of hand denial of Respondents' motion to sequester witnesses, including the alleged discriminatees, deprived Respondents of the opportunity for a full and fair disclosure of the facts.

The Board argues that the coincidence in time between the Union's demand for recognition and the terminations is substantial evidence of the Company's anti-union animus and that the terminations were motivated by such animus (Board's Brief p. 7). This argument is untenable. "Of course any discharge during a union campaign could be said to be ill-timed because suspicions on both sides are then at their peak." *Torrington Co.* v. *NLRB,* 506 F.2d 1042, 1048 (4 Cir. 1974). Of even greater importance is the lack of any evidence as to the Company's knowledge of the alleged discriminatees union activities before they were terminated. Such knowledge is required to sustain the holding of the Board. *NLRB* v. *Lexington Chair Co.,* 361 F.2d 283, 291 (4 Cir. 1966).

It was not until May 10, 1973 when the Union's letter for recognition was received by Respondents that it had any knowledge that there was any union activity (A5). It still had no knowledge who the employees were that had signed union cards. Stark phoned the Union on some "unidentified date" after receiving the letter (A5) and the Union delegate mentioned 2 or 3 names (also unidentified) of employees who had signed with the Union (A43). This conversation as testified to by Board witness Larmond took place after the unidentified 2 or 3 persons had already been fired, because Larmond said Stark told him the 2 or 3 persons had already been fired (A43). There is, therefore, no evidence that the Respondents knew before termination that the alleged discriminatees had joined the Union. Such knowledge is required to support the holding of the Board.

ARGUMENT

POINT I

The Administrative Law Judge's out of hand refusal to sequester witnesses, including the alleged discriminatees, denied Respondents the opportunity for a full and fair disclosure of the facts.

". . . [W]e have had, do have and will continue to have an adversary system designed to arrive at the legal truth. In such a system, the quality of justice dispensed . . . is dependent upon" a record being made wherein credibility of witnesses may be properly tested. (Judge Kaufman, *"Does a Judge Have A Right to Qualified Counsel,"* N.Y.L.J. March 27, 1975, p. 5, column 1). This Court when ruling upon NLRB findings of fact must determine (see Point II herein) whether the evidence, viewing the record as a whole, substantially supports the Board's finding. *Administrative Procedure Act,* 5 U.S.C. Sec. 706 (1970). It is not sufficient that there be merely enough favorable evidence to convince a reasonable man that the facts are true. The favorable evidence must be such that, viewing the record as a whole, *including the contrary evidence,* the findings of fact are supported by "substantial evidence". That is, the "substantial evidence" is relative to the contrary rebutting evidence, not to the evidence necessary to establish the fact in isolation. *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951).

"Due to this high degree of required scrutiny which enables the court of appeals to delve deeply into the evidence and their power to reject findings of fact and modify the NLRB decision and findings accordingly," of course . . . "before a determination of fact will be considered conclusive, the parties must have been afforded an opportunity for a full and fair disclosure of the facts." 27 No. 1, Administrative Law Review, Section of Administrative Law, ABA, Winter 1975, p. 96.

Since the May 11, 1973 incident involving the 4 alleged discriminatees[7] occurred when all 4 were present, Respondents moved for the sequestration of witnesses including all alleged discriminatees because it was obvious that a serious issue of credibility was involved.

The Administrative Law Judge, out of hand, without exercising any discretion on his part, denied this motion because it is "[t]he Board's uniform policy not to apply the rule to alleged discriminatees" (RA 1).[8] His "refusal to do so constituted error that could not have failed to prejudice" Respondents. (*NLRB* v. *Adhesive Products Corp.*, 258 F.2d 403, 408 [2 Cir. 1958]). The Board, in rejecting Respondents' contention likewise "adhered to its long established rule." (Board's Brief, p. 11, fn. 7).

We submit that in arriving at the truth the Administrative Law Judge must not be bound by any Board "uniform" policy or "long established rule." Despite the denial of sequestration "various inconsistencies" appeared in the testimony of the Board's witnesses (A12)[9]. Many more would have been developed if sequestration had been ordered.

Due process mandates that the Respondents' request for the sequestration of witnesses should have been granted. The failure so to do resulted in a denial of a fair trial to the Respondents.

> "Justice under law is, of course, the ultimate goal . . ." (*N.L.R.B.* v. *Rex Disposables*, 491 F.2d 588, 591 [5 Cir. 1974]).

The position that it is a long established uniform Board policy that alleged discriminatees can never be sequestered

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[7] Thompson, Evans, Huff and Maksymchak.

[8] "RA" references are to the Respondent's Appendix herein.

[9] "A" references are to the Appendix.

denies Respondents the opportunity for a full and fair disclosure of the facts, thereby resulting in the denial of a fair hearing.

The Board now argues whether or not the alleged discriminatees should have been sequestered rests "within the sound discretion of the Board's Administrative Law Judge" (Board's Brief, p. 11 fn. 7). But in our case the Judge, because of the Board's uniform policy, did not exercise any discretion at all, but applied the long established rule. The Board (Brief, p. 11) in support of the validity of this uniform rule cites *TIL Sportswear* and *Walsh-Lumpkin Wholesale Drug Co.* as authority. In neither of these decisions does it appear that the validity of such a rule was either raised before the court or passed on. The Board's reference to *Charles* v. *U.S.*, 215 F.2d 831, is not in point because there the motion to sequester was limited only to corroborating witnesses. In our case, the motion to sequester was addressed to all witnesses, including the alleged discriminatees.

In the *Charles* case, *supra*, the court at page 833, pointed out that:

> "It is well settled in courts of law that, whether witnesses are to be separated or 'put under the rule', is a matter resting in the sound discretion of the trial court. (Cases cited). The same rule, we think, should be applied to hearings before the Board or its *examiners.*" (Examiners are now called Administrative Law Judges. 37 Fed. Reg. 21481, 1972)

Not only did he deny sequestration but in his decision the Judge relies strongly on the fact that if there was fabrication, it seems more probably that it was the one witness (Respondent Harold Stark), rather than the four discriminatees who were lying, because "the likelihood of perjury or mistake becomes more remote in direct or geo-

metrical proportion to the number of witnesses who testify to a fact'' (A16).[10]

> ''With deference we cannot feel the force of this reasoning.'' (*N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743, 746 [2 Cir. 1953]).

Respondents could not have produced anyone else except Harold Stark with respect to the May 11 incident as he was the only person on behalf of Respondents who was present. For the Judge to play a numbers game of four versus one is ''[t]o hang so much on the slim peg of a few ambiguous sentences'' and ''to allow an excerpt of the record to swallow up the whole, something which *Universal Camera, supra,* forbids.'' (*Bon-R Reproductions, Inc.* v. *N.L.R.B.*, 309 F.2d 898, 907 [2 Cir. 1962]).

Whether to grant or to deny Respondents' request for sequestration should have been committed to the sound discretion of the Administration Law Judge and not to the Board's uniform long established rule.[11]

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[10] ''While a party is entitled to call as many witnesses as he may deem necessary to establish his claim or defense, . . . it is erroneous to suppose that an issue is to be determined by a count of witnesses and reference to numerical superiority. . . .

* * * *

Witnesses are not counted; their testimony is weighed . . .'' (*Jones on Evidence,* 6th Ed. 306-307).

[11] The courts have taken the Board to task for other fixed or per se rules. Thus, this court has admonished the Board because of the refusal to make available, for the purposes of cross-examination, a copy of a written statement made by a witness to a Board official, (*NLRB* v. *Adhesive Products Corp.*, 258 F.2d 403 (2 Cir. 1958), and has criticized the Board's flat rule that an employer cannot withdraw from an association once bargaining has begun, and has directed the Board to spell out those instances of extraordinary circumstances where such a rule should not be applicable. (*NLRB* v. *Spun-Jee,* 385 F.2d 378, 382 (2 Cir. 1967); and has overruled the Board's policy that interrogation in and of itself is an unfair labor practice. (*Bourne* v. *NLRB,* 332 F.2d 47, 48 (2 Cir. 1964). In *Retail Clerks* v. *NLRB,* —— F.2d —— 76 LC ¶ 10632, D.C. Cir. 1975) the court directed the Board to explain why national labor policy required that an "additional stores" clause be held illegal.

We submit that the circumstances in our case make such a hard and fast rule questionable and deprived Respondents of a fair hearing. In one breath the Board says the Judge must follow (and he did) its hard and fast rule of no sequestration of alleged discriminatees, and in another breath, it says that "It is the Board's estabished policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect." (*Standard Dry Wall Products, Inc.*, 91 NLRB 544 [1950]). This Board policy overlooks the fact that : "[T]he Examiner . . . sees the witnesses and hears them testify, while the Board and the reviewing court looks only at cold records." (*NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 [1962]).

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." *4 Jones on Evidence*, 6th Ed. 543. See also *6 Wigmore Evidence* Sections 1837-1838.

Rule 615 of the new Federal Rules of Evidence[12] makes sequestration a matter of right rather than one of discretion. *4 Jones on Evidence* 6th Edition 543 (Advisory Committee's Note).

So far as practicable, Board hearings are to be conducted in accordance with the rules of evidence applicable in the federal district courts. Sec. 10(b) of the Act "clearly relates to the introduction of evidence before the Board." (*NLRB* v. *Interboro Contractors Inc.*, 432 F.2d 854, 859 (2 Cir. 1970). The Board's Statement of Procedure, Series 8, as amended, 29 C.F.R., § 101.10, provides that in

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[12] Said Rule 615 entitled "Exclusion of Witnesses" in pertinent part states:

> "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion . . ."

Hearings "The rules of evidence applicable in the district courts of the United States are . . . so far as practicable, controlling."

The Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.8 provides that a "party" includes "any person filing a charge." The charges herein were not filed by the alleged discriminatees but by Local 32-B (A2, 32). *Assuming arguendo,* the validity of the Board's rule of non-sequestration of "parties" to the proceeding, the alleged discriminatees were not parties. Cf. *W. T. Grant Co.,* 214 NLRB No. 96, Nov. 1974), where the alleged discriminatee was the charging party.

While the Act commits to the Board the power and responsibility of determining the facts as revealed by the record, how can the Board intelligently exercise such power and responsibility if it enforces a fixed rule of no sequestration of alleged discriminatees. The enforcement of such a rule denies to Respondents the most effective tool "of discouraging and exposing fabrication, inaccuracy and collusion". *Jones, supra.* The value and effectiveness of the rule of sequestration was recently pointed out by the Board in *W. T. Grant Co., supra,* where it reversed an Administrative Law Judge's credibility resolutions and dismissed a complaint because other Board witnesses contradicted the alleged discriminatee. The Board pointed out (Slip Opinion p. 3 fn. 1). "In this respect we note that at the hearing all witnesses, with the exception of the Charging Party . . . were sequestered."

Respondents having been denied the opportunity for a full and fair disclosure of the facts before the Board made its order, this court is "not obliged to enforce it." (*Bon-R Reproductions Inc.* v. *NLRB,* 309 F.2d 898, 910 (2 Cir. 1962), J. Friendly concurring and dissenting.)

The Board's sequestration rule should have been "modified if the ends of justice seem to require it . . ." (*New-*

mark v. *Commr. Int. Rev.*, 311 F.2d 913, 918 fn. 1 (2 Cir. 1962); *NLRB* v. *National Container Corp.*, 211 F.2d 525, 534 (2 Cir. 1954). "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules for the orderly transaction of business before it when in a given case the ends of justice require it . . . The rule stated applies with especial force in cases before the National Labor Relations Board." (*NLRB* v. *Albritten Engineering Corp.*, 340 F.2d 281, 286 (5 Cir. 1965), cert. denied 382 U.S. 815.) "The Board is not the slave of its rules." (*National Container Corp.*, 211 F.2d 525, 534 (2 Cir. 1954).)

While the Board may adopt its own rules, it exceeds its authority under the Act and acts arbitrarily when it enforces an inflexible rule. *NLRB* v. *Vapor Blast Manufacturing Co.*, 287 F.2d 402 (7 Cir. 1961). The Board's arbitrary and unilateral refusal to permit any sequestration of alleged discriminatees has deprived Respondents of an opportunity for a full and fair disclosure of the facts. The Board's determination not to permit sequestration of alleged discriminatees exceeds its authority and is contrary to the provisions of Sec. 10(b) of the Act. Because of such a rule, the record made before the Administrative Law Judge is one-sided in favor of the Board. The record naturally preponderates in the Board's favor when it denies the opportunity of discouraging and exposing fabrication and collusion by absolutely refusing sequestration of alleged discriminatees.

Since this court must determine whether substantial evidence on the record as a whole supports the Board's decision and in making such determination this court must review all the evidence and not only that which supports the Board's decision, before such determination can be made Respondents must have been afforded an opportunity for a full and fair disclosure of the facts. Such opportunity was not afforded Respondents.

POINT II

On the record as a whole there is not substantial evidence to support the Board's decision.

The Board's decision cannot be affirmed unless it is supported by "substantial evidence on the record considered as a whole." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951), Administrative Procedure Act, 5 U.S.C. § 706 (1970). The court must set aside the Board's decision if it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." The court reviews the record including that portion which "fairly detracts" from the Board's findings. *Id.* at 488. To discharge this duty the court must review all of the evidence and not only that which supports the Board's decision. (*T.I.M.E. D.C. Inc.* v. *NLRB,* 504 F.2d 294 (5 Cir. 1974), *Bon-R Reproductions, Inc.* v. *NLRB,* 309 F.2d 898, 903 (2 Cir. 1962)).

The test of substantial evidence is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. *NLRB* v. *Columbian Enamelling & Stamping Co.,* 306 U.S. 292, 300 (1939); *Dubin-Haskell Lining Corp.* v. *NLRB,* 375 F.2d 568, 573 (4 Cir. 1967); *Riggs Distler & Co.* v. *NLRB,* 327 F.2d 575, 580 (4 Cir. 1963).

Thus, the Board's findings may not rest on "suspicion, surmise, implications or plainly incredible evidence." *Amyx Industries, Inc.* v. *NLRB,* 457 F.2d 904, 907 (8 Cir. 1972).

> "[c]ircumstances that merely raise a suspicion that an employer may be activated by unlawful motives are

> not sufficiently substantial to support a finding." (*NLRB* v. *Ace Comb Co.*, 342 F.2d 841, 848 (8 Cir. 1965).)

It is impossible for a discharge to be discriminatory without proof that the employer had knowledge of the employee's union activities, *Amyx Industries, Inc.* v. *NLRB, supra,* 457 F.2d at 906 (8 Cir. 1972); *NLRB* v. *Ace Comb Co.*, 342 F.2d 841, 848 (8 Cir. 1965) and the Board always has the burden of proving such knowledge with substantial evidence. *Amyx Industries, Inc.* v. *NLRB, supra; NLRB* v. *Melrose Processing Co.*, 351 F.2d 693, 697 (8 Cir. 1965).

The Board must prove by substantial evidence that the real reason for the discharge was the employee's suspected union activity.

The fact that the company chose not to present any evidence has no effect on the Board's burden of proof, and no inferences of wrongdoing can be drawn from the company's failure to disclaim the Board's allegations. *NLRB* v. *Century Broadcasting Co.*, 419 F.2d 771, 776-777 (8 Cir. 1969).

Generally an "employer may discharge the employee for good cause, no cause, or for any reason he chooses, except the employee's union activity." *Torrington Co.* v. *NLRB*, 506 F. 2d 1042, 1047 (4 Cir. 1974); *NLRB* v. *Century Broadcasting Corp.*, 419 F.2d 771, 778 (8 Cir. 1969). This court in *NLRB* v. *Milco, Inc.*, 388 F.2d 133, 138 (2 Cir. 1968) stated:

> "[I]t is equally clear that a discharge for some appropriate reason is not rendered unlawful merely because the employer suffered no sorrow at the departure of a union man. *NLRB* v. *Birmingham Publishing Co.*, 262 F.2d 2, 9, 5 Cir. 1958; *Local 357 Int'al Brotherhood of Teamsters, etc.* v. *NLRB*, 365 U.S. 667, 679-680."

As stated in *NLRB* v. *Ace Comb Co., supra:*

> "[O]nce it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer, and the Board may not substitute its judgment for that of the employer." (342 F.2d at 847)

In *Bill's Coal Co. Inc.* v. *NLRB,* 493 F.2d 243, 245 (10 Cir. 1974), the court in finding that a discharge of 9 employees was not discriminatory stated:

> "Discrimination may not be inferred from the mere fact that a discharged employee was a union member . . . so does the fact that all 9 employees who were laid off had signed union cards permit, in and of itself, the inference of discrimination.
>
> . . . proof of a employer's knowledge of his employees' union activity is a prerequisite to the establishment of a discriminatory lay off or discharge. *Dubin-Haskell Lining Corp.* v. *NLRB,* 375 F.2d 568 (4 Cir. 1967) . . ."

This court in *Bon-R Reproductions, Inc., supra,* at pp. 903-4 said:

> "The discharge of Scrima was not an unfair labor practice because it was not motivated by a purpose to 'encourage or discourage [union] membership by means of discrimination.' (*Radio Officers' Union of Commercial Telegraphers Union, AFL* v. *NLRB,* 347 U.S. 17, 42, 74 S.Ct. 323, 337, 98 L.Ed. 455 (1954). We recognize the power of the Board to infer Spielman's (i.e. the employer) motive from his conduct see id, at 48-52, 74 S.Ct. 323, but such an inference must be such 'as reasonably may be based upon the facts proven.' Id. at 49, 74 S.Ct. at 340."

To support the Board's finding that the discharges were unlawful, there must be substantial evidence in the record

showing that the employee was engaged in labor union activity and that the employer had some knowledge of this *at the time of the discharge.*[13] *Southwest Latex* v. *NLRB,* 426 F.2d 50, 56 (5 Cir. 1970); *Hugh H. Wilson Corp.* v. *NLRB,* 414 F.2d 1345 (3 Cir. 1969); *Signal Oil and Gas Co.* v. *NLRB,* 390 F.2d 338 (9 Cir. 1968); *Indiana Gear Works* v. *NLRB,* 371 F.2d 273 (7 Cir. 1967).

A proper approach to the question whether the discharges were unlawful requires that three considerations be kept in mind: (1) whether they were union supporters; (2) did the Respondents know or should they have known that they were union supporters; and (3) whether their discharge was motivated by their support of the Union.

As the court said in *NLRB* v. *Birmingham Publishing Co.,* 262 F.2d 2, 8-9 (5 Cir. 1958) (cited with approval in *NLRB* v. *Milco, Inc.,* 388 F.2d 133, 138 (2 Cir. 1968):

> "This court has held that 'the burden is on the Board to prove and not on the employer to disprove the presence of anti-union animus or other prohibited discriminatory motivations in hiring and firing.' (cases cited). We cannot say that the Board has met the burden of proof that Edwards' discharge was 'discriminatorily motivated' or that the Board's finding of unlawful motivation is supported by substantial evidence.
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> * * *
>
> If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union. We have no doubt that the Bir-

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[13] An employer must be aware of employees' union activities in order to discharge them on the basis of those activities. *Local 728 Teamsters* v. *NLRB,* 403 F.2d 921, 923 (D.C. Cir. 1968), cert. denied 397 U.S. 935; *General Mercantile & Hardware Co.* v. *NLRB,* 461 F.2d 952, 955 (8 Cir. 1972); *NLRB* v. *Lexington Chair Co.,* 361 F.2d 283, 291 (4 Cir. 1966).

> mingham Publishing Company was glad to get rid of Edwards. . . . We cannot say, and the evidence does not support the conclusion that the Board can say: Edwards was fired because the Company's officials had an anti-union animus against Edwards."

In a discriminatory discharge case "a violation rests upon the motive of the employer in making the discharge, not upon what it appears to have been either to the victim or to the union." *NLRB* v. *Dalton Brick & Tile Corp.,* 301 F.2d 886, 897 (5 Cir. 1962). In *NLRB* v. *McGahey,* 233 F.2d 406, 412, 413 (5 Cir. 1956), the court said:

> "The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: It may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."

Absent showing of anti-union animus by the Company, the employee may be discharged for good cause, no cause, or for any reason the Company chooses. *NLRB* v. *I. V.*

Sutpin Co. Atlanta, Inc., 373 F.2d 890 (5 Cir. 1967). The corollary of that rule is that to prove a violation of § 8(a) (1) and (3) in a discharge case, knowledge by the employer of the employee's union activity must be proved. *Texas Aluminum Co.* v. *NLRB*, 435 F.2d 917, 919 (5 Cir. 1970).

Nor does an employee gain immunity "from discharge simply because . . . he is a union member or adherent." *NLRB* v. *Florida Corporation, etc.*, 308 F.2d 931, 935 (5 Cir. 1962). "[T]he fact that a worker takes part in protected activity does not insulate him from discharge for legitimate business reasons." *NLRB* v. *Hanes Hosiery Division*, 413 F.2d 457, 458 (4 Cir. 1969). "If discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership." *NLRB* v. *United Brass Works, Inc.*, 287 F.2d 689, 693 (4 Cir. 1961).

We respectfully submit that the evidence supporting the Board's decision is not substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. The Board's findings are required to be given no more weight than reason would dictate and, in the light of judicial experience, they deserve. *Universal Camera, supra.* In *Bon-R Reproductions, supra,* Judge Friendly in his concurring and dissenting opinion stated: "We thus may not properly set aside the portion of the Board's order relating to . . . discharge. But we are equally not obliged to enforce it" (At p. 910).

POINT III

Answering the Board's brief.

The Board argues that the timing of the terminations is strong evidence that the Respondents were motivated by

anti-union considerations. The cases relied on by the Board are inapposite.

In *NLRB* v. *Rubin,* 424 F.2d 748 (2 Cir. 1970), the employee was terminated after he was seen passing out authorization cards in front of the company's building and after the Employer inquired of employees who had signed union cards and after the employer had threatened to lay off or shut down a complete shift. There was a background of employer interrogation of employees concerning union activities. In addition, the Employer knew that the dischargee was the "principal union organizer" (p. 750). The court pointed out that because of all of the above factors, the timing of the discharge was discriminatory. In our case, there is no such background of anti-union animus, nor any evidence that any of the alleged discriminatees were principal union organizers. In addition, the employer in the *Rubin* case had engaged in interrogation inquiring who was behind the union activity and who had signed cards. The court in finding the discharge to be discriminatory did so because of "[A]ll of this . . ." In *NLRB* v. *Long Island Airport Limousine Service Corp.,* 468 F.2d 292 (2 Cir. 1972), the discharged employee "was the union 'spearhead' for organizing the company's drivers . . ." (p. 295). Shortly before the employee was discharged a company supervisor had seen the dischargee signing up another employee and the very next day the union's spearhead for organizing was fired. All of this does not appear in our case.

In *NLRB* v. *L. E. Farrell Co.,* 360 F.2d 205 (2 Cir. 1966), the employer was aware that the discharged employee had taken a leading roll in organizing the employees and as this court said, "President Farrell and Foreman Sartwell were aware of Patche's leadership" (p. 207). Moreover, in that case a few days after receiving the union request for recognition, the company began a concerted campaign to thwart unionization of the plant; employees were threat-

ened; they were told that they would lose benefits; employees were told that they were being placed under surveillance; management inquired from employees as to who started and who belonged to the union; threats of loss of jobs were made as well as lay off; and loss of overtime. Because of all this very severe interference and violations of Sec. 8(a)(1) of the Act and because the company was aware that the employee discharged had taken a leading role in organizing, this court sustained the Board's order. Of course, the abruptness of Patch's discharge in that case and its timing against the background of the severe violations of Sec. 8(a)(1) convinced the court to sustain the Board's order. In our case there is no such background of severe violations of Sec. 8(a)(1). At best the short conversation with Bishop was of trivial nature and was not coercive.

In *NLRB* v. *Milco, Inc.*, 388 F.2d 133 (2 Cir. 1968), the employer admittedly knew that the discharged employee was "an ardent union sympathizer, and his allegiance was admittedly known to the employer prior to the decision to discharge him" (p. 138). He was discharged immediately following the union victory in an election and at a time when the employer was "engaging in acts indicating hostility toward the union" (p. 139). The Board there produced evidence that other employees with equally bad absentee records had not been discharged. The court placed great stress on the fact that the warning slips which were allegedly given to the employee had been "contrived" (p. 139). Because of the falsification of these warning slips and the threats of plant closing or removal as well as the company's admitted knowledge that the employee was an ardent union sympathizer, and that other employees with equally bad records were not discharged, and that the discharge took place immediately after the union won the election, this court sustained the discharge.

The court pointed out that the abruptness of the discharge and the timing was "less persuasive" than the

falsification of the warning slips and that other employees had not been discharged with equally bad absentee records. In our case, the timing of the discharges is not persuasive at all, but merely coincidence.

It is all too easy to say (as the Board contends) that adequate cause for discipline was seized upon as pretextual in the case of employees who signed union cards. The fact is that cause for discharge is of peculiarly legitimate concern in such instances; management cannot run its business if employees who sign union cards can ride roughshod on the basis that signing union cards immunizes them from performing their work or lying to their employer. When cause for discharge appears, the burden is on the Board not simply to discover some evidence of improper motive, but to establish an affirmative and persuasive reason why the Respondents rejected the cause for discharge. "The mere existence of anti-union animus is not enough. The fact that the employer may be pleased to effectuate the discharge does not mean that this was his primary motive." *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801, 803 (1 Cir. 1968).

With respect to the terminations on May 11, the Respondent did not set in motion the series of events. Thompson, Evans and Huff left their jobs and refused to work and Maksymchak, for reasons best known to himself, decided to join them and also not to work.

Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding of discharge in violation of the Act. A discharge for an appropriate reason is not rendered unlawful merely because the employer suffered no sorrow at the departure of an employee who happens to have signed a union card. Once it is determined that disciplinary action is warranted, the extent of the action taken is purely within the discretion of the employer and the Board may not substitute its judgment for that of the employer.

The burden was on the Board to prove and not on the Respondents to disprove the presence of anti-union animus or other prohibited discriminatory motives in the terminations. If an employee has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro union and his employer anti-union.

Our case is not like the cases, relied on by the Board but is like that of *NLRB* v. *Birmingham Publishing Co.*, 262 F.2d 2, 9 (5 Cir. 1959), cited with approval in *NLRB* v. *Milco, Inc.*, 388 F.2d 133, 138 (2 Cir. 1968). In the *Birmingham* case, the court refused to enforce a Board order directing reinstatement and backpay of an employee who had left his job during working hours despite the fact that the leader of the anti-union faction was allowed freedom to roam the plant and the company had fostered a movement to decertify the union, furnishing advice and assistance in distributing decertification petitions. See *NLRB* v. *Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728-9 (2 Cir. 1965) where this court denied enforcement of a Board order despite the employer's knowledge of the employee's union activity. Cf. *NLRB* v. *Pembeck Oil Corp.*, 404 F.2d 105, 110 (2 Cir. 1968), where the employer's knowledge of the discharged employee's union activities was inferred because the company knew when he was hired that he was a union member and because the employee had engaged in union activity "in the plant during working hours". In our case, the single instance of union activity was the secret signing of the union designation cards at a private apartment. Where union cards are signed in a plant during working hours it is reasonable to infer that the employer knew about it. But it is not reasonable to infer that the employer knew about the signing of union cards when it was done in a private apartment and there is not a scintilla of evidence to show that the employer had any knowledge thereof.

The Board argues that because Fred Stark was not called as a witness, an adverse inference is warranted. The Board cites such cases as *NLRB* v. *A.P.W. Products,* 316 F.2d 899 (2 Cir. 1963). That case and the others cited by the Board are not in point. In *NLRB* v. *Century Broadcasting Co.,* 419 F.2d 771, 776-77 (8 Cir. 1969), the court pointed out that the Board has the burden of proof of its case. An inference against the Respondents cannot be inferred simply because the Respondents did not call Fred Stark as a witness to disclaim the Board's allegations. The fact is that Harold Stark was present throughout the conversations with Peters concerning his discharge and he did testify and did contradict Peters. The rule urged by the Board only applies where the Respondent has not produced any material witness who was present at the time of Peters' discharge. We did produce a material witness to wit, Harold Stark. Harold Stark was a material witness, was present and was in a posititon to and did contradict Peters. Thus the rule of the absence of material witnesses is not applicable.

In *National Maritime Union* v. *NLRB,* 353 F.2d 521 (2 Cir. 1965), the Respondent there did not produce any material witnesses. In our case we did produce a material witness. Cf. *NLRB* v. *Tenn. Consolidated Coal Co.,* 307 F.2d 374, 378 (6 Cir. 1962), where neither of the 2 witnesses who might shed some light on the question were not called as witnesses.

The Board argues (Brief, p. 11 fn. 6) that Stark's conditioning of Maksymchak's reemployment on his abandonment of the union was properly found to be a violation of the Act, citing *NLRB* v. *Wings and Wheels, Inc.,* 324 F.2d 495 (3 Cir. 1963). In our case, the complaint did not allege nor was the case tried on that theory. The complaint alleged, and the case was tried on the theory that, Maksymchak's discharge on May 11 was violative of the Act and not his reemployment thereafter. In the *Wings and Wheel*

case, *supra*, the complaint did allege and the case was there tried on the theory that, conditioning reemployment on withdrawal from the union was violative of the Act. In our case, neither the Administrative Law Judge nor the Board made any such finding.

The Board argues (Brief, pp. 13-14) that there was a lack of evidentiary support that Peters was a supervisor within the meaning of the Act. He admitted that in addition to supervising the roving maintenance men he had the duty and responsibility to see that not only was their work done but that it was done properly (A214). In order for a person to have the authority to see that another person does his work and does it properly, he must of necessity exercise the responsibility to direct these workers so that the work is done properly. He admitted that as part of his duties and responsibilities he would check up on the men's work (A293). He did not deny the specific incidents dealing with his disciplining by firing 2 or 3 employees who had not done enough work to suit him (A235, 280) and on another occasion, his recommendation to Respondents that other employees be fired because they weren't doing good work and his recommendation being followed and the employees being discharged (A285). The record accordingly shows that Peters had the duty and responsibility and in fact did on occasion perform one or more of the tasks which qualified him for supervisory status. See *NLRB* v. *Coral Sportswear Co.*, 383 F.2d 961, 963-64 (10 Cir. 1967).

In *NLRB* v. *United Brass Works, Inc.*, 287 F.2d 689, 691 (4 Cir. 1961), the court stated:

> "However, where material uncontradicted evidence has been ignored, *NLRB* v. *Cleveland Trust Co.*, 6 Cir. 1954, 214 F.2d 95, 98, or where evidence has been disregarded or eliminated by the causal expedient of discrediting an employer's witnesses, *NLRB* v. *Miami Coca-Cola Bottling Co.*, 5 Cir. 1955, 222 F.2d 341, 345, the result is that the Trial Examiner's report and the

Board's findings will not be accorded the presumption of correctness usually attributed to the trier of fact."

Sworn testimony cannot be arbitrarily disregarded on the mere suspicion or assumption that witnesses were lying. *NLRB* v. *Atlantic Coca Cola Bottling Co.*, 293 F.2d 300, 306 (5 Cir. 1961); see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 484 and fn. 17, 71 S.Ct. 456 (1951).

With respect to the termination of the 6 employees, the Judge relied on the fact that the Respondents did not offer them reemployment. Neither the complaint nor the trial concerned itself with any failures to offer reemployment. The issues presented by the pleadings and litigated were whether or not in fact the 6 terminations took place for anti-union animus. Any subsequent offers of reemployment are immaterial and irrelevant to the issue of whether or not at a time prior to the alleged requests for reinstatement the terminations were motivated by anti-union animus.

It is equally clear that a discharge for some appropriate reason is not rendered unlawful merely because the employer refused the employee reinstatement or suffered no sorrow at the departure of a union man.

CONCLUSION

For the reasons stated, it is respectfully submitted that the application for enforcement of the Board's order should be denied.

Respectfully submitted,

CHARLES R. KATZ
Attorney for Respondents

April, 1975.

RESPONDENTS' APPENDIX

Mr. Katz: Before General Counsel calls any witnesses, I'd like to make a motion for sequestration of witnesses, because in this case there will be a very sharp issue of credibility involved. And my motion encompasses, as a result of some inquiry made of me by the General Counsel, the alleged 8(a)3's.

Judge Schneider: Your motion would encompass those?

Mr. Katz: Yes.

Judge Schneider: I am prepared to grant the motion to sequester witnesses, Mr. Katz, but it will not include persons who are alleged to have been —in the complaint to be discriminatees. The Board's uniform practice has been not to apply the rule to those persons.

All other witnesses are asked to be excused.

Ms. Johnson—

Mr. Katz: I realize I have an automatic exception to your ruling.

Judge Schneider: Yes.

* * * * * *

Felipe Ortiz called as a witness, * * *

Direct Examination:

Q. (By Ms. Johnson) Please state your name and address for the record.

A. (In English) Felipe Ortiz, 525 West 169.

Mr. Katz: If Your Honor pleases, it appears from the question just asked, which the witness himself just answered, there is no need for an interpreter.

I would suggest we follow the procedure of letting the witness make direct answers, and such times as it becomes necessary we can then use the services of the interpreter.

Ms. Johnson: Could we go off the record, please?

Judge Schneider: Surely.

(Discussion off the record.)

Judge Schneider: On the record.

Let the record show that General Counsel has acceded to the request of Counsel for Respondent.

Q. (By Ms. Johnson) Mr. Ortiz, are you currently employed?

Where do you work? A. Now?

Q. Yes.

Mr. Katz: May I say this?

He's looking at the interpreter and he's not using the interpreter.

If the interpreter would sit down a little further, it might avoid him looking at the interpreter each time, and then not making an answer.

Ms. Johnson: Maybe he didn't understand the question.

Judge Schneider: Let the record show that the interpreter has complied with Mr. Katz' request.

Q. (By Ms. Johnson) Mr. Ortiz, are you currently employed? A. I no speak English.

Q. Where do you work now? A. Now, Long Island City.

Judge Schneider: Just a minute.

Off the record.

(Discussion off the record.)

Q. (By Ms. Johnson) Mr. Ortiz, were you previously employed by Fred Stark? A. I no understand. I no—

Q. Did you use to work for Fred Stark, for Mr. Stark? A. Yes.

Q. What was your position? A. Porter.

Q. Where did you work? A. Porter.

Q. Were you assigned to a building? A. Sweep, mop. There was garbage outside.

Q. Where did you do this work? A. I—

Q. What building did you work at? A. 205 Jamaica Avenue.

Q. When did you start working for Mr. Stark? A. January 15th, '73.

Q. Who gave you your job assignments? Who told you what to do ? A. I no speak—I understand English, but no speak—

Q. Did you understand what I asked? Who gave you your work? Who told you what to do? A. I—

Q. Did you understand my question? A. I understand, but I don't know—

Repeat, you know, conversation, trouble, you know.

J[illegible] Schneider: May I ask at this point that the—

The Witness: I understand, but I no talk.

Judge Schneider: May I ask at this point that the interpreter ask the witness—

* * * * * *

Q. (By Mr. Katz) Mr. Ortiz, at the hearing before the unemployment insurance, before the judge, in June of 1973, weren't you asked if you wanted an interpreter, and you said, no? A. They asked me. I told them no.

The Interpreter: I didn't understand what he said after that.

Filipe Ortiz—Cross.

Mr. Katz: May I now have marked as Respondent's 9,—

* * * * * *

Judge Schneider: Let the record show that the witness got up, banged on the table, in an apparently angry manner. Got up and made a gesture, and now has sat down.

Mr. Interpreter, are you able to interpret what the witness has said?

The Interpreter: Just, I go home.

* * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED STARK AND JAMAICA 201 ST. CORP., INC
AND JAMAICA 202 ST. CORP., INC.,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on April 21, 1975, she served 2 copies of Brief and Appendix for Respondents

on

ELLIOTT MOORE, ESQ.,
DEPUTY ASSOCIATE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D. C. 20570

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
21st day of April, 1975

Charles J. Esposito

CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 19 77